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Supreme Court of the United States

October Term, 1931.

No. 470

WILLIAM A. W. STEWART, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI AND PETITIONER'S BRIEF ON APPLICATION.

CHARLES HENRY BUTLER,
Counsel for Petitioner.

Supreme Court of the United States

October Term, 1931

No.

WILLIAM A. W. STEWART, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petition of WILLIAM A. W. STEWART respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

The Circuit Court of Appeals for the Second Circuit, by its decree entered July 24, 1931, has affirmed an order of the United States Board of Tax Appeals sustaining the

action of the Commissioner of Internal Revenue in determining a deficiency in the income tax of the petitioner for the year 1924. The precise question involved has also arisen in the First Circuit, where the Circuit Court of Appeals has decided adversely to the contention of the government. The decisions in the two circuits are in flat contradiction to each other.

There is no dispute as to the facts. The appellant made and filed his individual return of income of 1924, making his return for the calendar year. A substantial part of the appellant's income consisted of his distributive share, as a partner, of the partnership income of the law firm of Stewart & Shearer. The firm filed a partnership return on the basis of the fiscal year ending April 30, 1924. The appellant included in his individual return for the calendar year 1924 his distributive share of the partnership income for its fiscal year, thus including eight months income earned in 1923.

Former revenue acts had provided specifically for the case of a partnership return for a fiscal year made up of portions of two calendar years to which different rates were applicable. With slight modification of phraseology this provision was continued in the Revenue Act of 1924. By the provisions of Section 207(b) the tax imposed on an individual whose return included a distributive share of the income of a partnership reporting for a fiscal year of this kind conformed, as to the tax on such distributive share, to the rates applicable to the two portions of his partnership's fiscal year.

The rates applicable to income of 1923 were fixed by Section 1200, subd. (a), of the Revenue Act of 1924,

which, in the case of a taxpayer making a return for that calendar year, gave him a refund or credit, as the case might require (depending on whether or not he had paid the tax), of 25 per cent of the amount of the tax under the Revenue Act of 1921. The reduced rates thus made applicable to incomes of 1923 were not identical with those for 1924 imposed by the same act of 1924, so that a fiscal year expiring April 30, 1924, was made up of portions of two calendar years to which different rates were applicable.

Further provisions for insuring to the person paying a tax in respect to income earned or accruing in 1923 but returned in a return for a fiscal year different from the calendar year 1923 were made by Sections 1201(a) and 1201(b) of the act of 1924. Section 1201(a) provided for the case of a taxpayer making a return for a fiscal year beginning in 1922 and ending in 1923, and Section 1201(b) for that of a taxpayer making a return for a fiscal year beginning in 1923 and ending in 1924. In each case a credit of 25 per cent was allowed for that part of the tax corresponding to the portion of the fiscal year falling within 1923.

The government has contended that none of these sections gave relief to a taxpayer in the situation of the appellant, that is, of one who made a return for the calendar year 1924 of income which included his distributive share of partnership earnings for a fiscal year falling partly within 1923 and partly within 1924, and has refused to allow claims for refund or claims in abatement based thereon. The question was squarely presented in *Maddison* v. *White* (40 Fed. (2d) 564), where the District Court for

the District of Massachusetts overruled the government's contention and held that a taxpayer whose 1924 income included a partnership distributive share of the kind above stated was entitled to the 25 per cent reduction. This decision was unanimously affirmed by the Circuit Court of Appeals for the First Circuit, *White* v. *Maddison,* (45 Fed. (2d) 335).

The present proceeding was initiated and brought before the Board of Tax Appeals prior to the decision of the *Maddison* case. The Board upheld the government's contention and refused to allow the taxpayer the 25 per cent reduction. Thereafter by petition for review the case was duly brought before the Circuit Court of Appeals for the Second Circuit. Meanwhile the decision had been rendered in the *Maddison* case, but in the present case the Circuit Court of Appeals for the Second Circuit declined to follow the decision of the Circuit Court of Appeals for the First Circuit in the *Maddison* case, and affirmed the action of the Board. It is to review this decision that the present application for certiorari is made.

B

Reasons Relied on for the Allowance of the Writ

1. The sole question is whether the 25 per cent reduction in the tax on 1923 income granted by the Revenue Act of 1924 should be taken into consideration in computing the tax income reported by an individual for the calendar year 1924, as a share of profits or income attributable to 1923 from a partnership whose fiscal year ended

April 30, 1924. The text of the several sections of the act above referred to, under which the reduction is claimed, is set forth in the petitioner's brief on this application presented herewith.

2. The decision of the court below is as above stated in irreconcilable conflict with that made by the Circuit Court of Appeals for the First Circuit on a state of facts practically identical with that in the case at bar. Under circumstances precisely similar to those here presented, the Circuit Court of Appeals in the First Circuit holds that the taxpayer is entitled to the benefit of the 25 per cent reduction. No certiorari to review that decision was applied for, and the time for such application has long since expired. Until the conflicting decision in the case at bar, the ruling in *White* v. *Maddison* stood as the controlling judicial interpretation of the law on this subject.

3. These conflicting decisions make the present state of the law one of hopeless confusion. Of two taxpayers having incomes identical in kind and received from precisely similar sources, the taxpayer in one part of the country finds his income tax burden substantially different in rate from that of the other taxpayer, residing in another part of the country. One receives a 25 per cent credit on the tax on income accrued in 1923 and the other does not. This conflict of law is bad enough for those in the First and Second Circuits, but at least each knows for what tax he will be held liable, although there is one law for the First Circuit and another for the Second, but in the remaining seven circuits it is impossible for taxpayers simi-

larly situated to know the amount of their tax, for they are confronted by judicial precedents diametrically opposed yet of equal authority. Until this conflict of authority be resolved, taxes, so far as this particular kind of tax is concerned, have ceased to be "uniform within the United States." The conflict is not only irreconcilable but of general interest and substantial in scope, for there are throughout the country many thousands of partnerships that keep their books on a fiscal year not identical with the calendar year, and many cases as yet undetermined involving the application of the 25 per cent credit granted on the lowering of the rates in 1924.

4. The decision below is thus flat in the face of what has hitherto been the controlling authority, "from which," says the court below, "with all deference, we feel compelled to differ" (Rec. p. 42).

5. Whether the court below was warranted in refusing to taxpayers in the Second Circuit the relief which the courts award them in the First is considered in our brief submitted with this petition. But whatever may be said in favor of the decision in the Second Circuit, the question should not be left in this state of hopeless confusion. Only by granting a writ of certiorari can this conflict of authority be remedied.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit

Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 29,229, William A. W. Stewart, *v.* Commissioner of Internal Revenue, and that the said decree of the said Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

October, 1931.

WILLIAM A. W. STEWART,

By CHARLES HENRY BUTLER,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1931

WILLIAM A. W. STEWART

Petitioner

against

COMMISSIONER OF INTERNAL REVENUE

Respondent

GEORGE L. SHEARER

Petitioner

against

COMMISSIONER OF INTERNAL REVENUE

Respondent

BRIEF FOR PETITIONERS ON APPLICATIONS FOR WRITS OF CERTIORARI

These are applications for certiorari to review two decrees of the Circuit Court of Appeals for the Second Circuit entered July 24, 1931, one affirming a determination of the

Board of Tax Appeals adjudging a deficiency of $7,435.71 on the income tax of the petitioner William A. W. Stewart for 1924, and the other affirming a like determination in the case of the petitioner George L. Shearer in the sum of $8,488.18 for the same year. The sole question in each case relates to the applicability to the petitioner of the 25 per cent. reduction in rates of income tax made by the Revenue Act of 1924.

The two cases were heard together in the court below and a single opinion written covering both cases. A separate application for certiorari is made and a separate record presented in each case, but as the question presented is identical in both cases, the brief is identical and is therefore entitled in both cases.

The opinion below has not yet been reported in the official reports or elsewhere.

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Jurisdiction

Jurisdiction to review is conferred by Section 347 of the Judicial Code, providing that in any case, civil or criminal, in a Circuit Court of Appeals, it shall be competent for the Supreme Court, upon the petition of any party thereto, to require by certiorari that the case be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the case had been brought there by unrestricted writ of error or appeal. The decrees below were entered July 24, 1931, and these applications are made within the three months prescribed by Section 350 of the Judicial Code.

Each of the present cases is one of those specified in Rule 38 par. 5, subd. (b), "where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter." It is further submitted by the petitioner in each case that apart from this fact the case is one of those mentioned in such subdivision as one wherein the court below has decided an important question of general law in a way probably untenable and in conflict with the weight of authority, and has decided an important question of federal law which has not been, but should be, settled by this court.

Statement of Case

The petitioners are members of the partnership of Stewart & Shearer, with offices at No. 45 Wall Street, New York City. In 1925 they made and filed their individual income tax returns for 1924 on a basis of a fiscal year as to

their partnership income and of a calendar year as to their other income. In each case the return was made on the "Fiscal Year" blank form. The additional taxes imposed are assessed for the calendar year 1924. The partnership of Stewart & Shearer made and filed a partnership return of income on the basis of a fiscal year ending April 30, 1924. The petitioners included in their individual returns for the year 1924 their distributive shares of the partnership profits for its fiscal year ending April 30, 1924, thus including eight months of such profits earned in 1923.

The Commissioner correctly found the tax on income attributable to 1923, at the old 1923 rates before the reduction thereof effected by Section 1200 (a) of the Revenue Act of 1924, to be $23,732.92 in the case of petitioner William A. W. Stewart (Rec., fol. 59), and $27,244.32 in the case of petitioner George L. Shearer (Rec., fol. 56). In computing the tax on that portion of the income to which the rates for the calendar year 1923 applied he did not allow either of the petitioners the benefit of the reduction of 25 per cent. provided for by Sections 1200 (a) and 1201 (b) of the Revenue Act of 1924. The allowance of such 25 per cent. would result in a reduction of the tax claimed on income attributable to 1923 by $5,933.23 in the case of petitioner William A. W. Stewart and by $6,811.08 in the case of petitioner George L. Shearer.

The Commissioner's determination was in each case approved by the Board of Tax Appeals (Rec., Stewart, fols. 60, 62-66; Shearer, fols. 57, 61-63), and on review by the Circuit Court of Appeals for the Second Circuit the Board's determination was affirmed (Stewart, p. 44; Shearer, p. 42).

Statutes Involved

The pertinent provisions of the Revenue Act of 1924 are as follows:

Sec. 207 (b):

"If a fiscal year of a partnership begins in one calendar year and ends in another calendar year, and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then

"(1) The rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year, and

"(2) The rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year.

"In such cases the part of such income subject to the rates in effect for the most recent calendar year shall be added to the other income of the taxpayer subject to such rates and the resulting amount shall be placed in the lower brackets of the rate schedule applicable to such year, and the part of such income subject to the rates in effect for the next preceding calendar year shall be placed in the next higher brackets of the rate schedule applicable to such year."

Sec. 218 (a):

"Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity.

"There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the taxable year upon the basis of which the partner's net income is computed."

Sec. 1200:

"(a) Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return."

Sec. 1201:

"(a) Any taxpayer making return, for a period beginning in 1922 and ending in 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of his tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

"(b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923, is of the entire period."

Conflict of Decisions in the Circuit Courts of Appeals

In *White* v. *Maddison* (45 Fed. (2d) 335, affirming *Maddison* v. *White*, 40 Fed. (2d) 564), arising on a state of facts practically identical with that in the cases at bar, it was held by the Circuit Court of Appeals for the First Circuit that an individual making a return for the calendar year 1924 whose income as returned included his distributive share of a partnership making a return for a fiscal year beginning in 1923 and ending in 1924, was entitled to the 25 per cent. reduction of the tax on that part of the income attributable to 1923. The decisions of the Circuit Courts of Appeal in the First and Second Circuits are thus in irreconcilable conflict. In its opinion below the court refers to the decision in the *Maddison* case as one "from which with all deference, we feel compelled to differ" (Stewart p. 42; Shearer, p. 40).

On these applications we respectfully submit that the question being one on which there is admittedly hopeless conflict of authority in the two circuits, and one of general interest and substantial in scope, partnership returns for fiscal years being of wide use throughout the country and the determination of the proper tax being one demanded in

a vast number of such cases, the law should be settled by this court.

It is unnecessary to present any argument on the ground of conflict of authority. The conflict is patent and not disputed. Its general interest and wide scope are apparent on a mere statement of the issue. It may be proper to summarize briefly the considerations on which we urge that the decision in the present cases is erroneous in law and should be reversed and the rule as laid down and applied in the First Circuit approved.

Specification of Errors

I. The Circuit Court of Appeals erred in holding that the rates of tax on income of 1923 as used in Section 207 (b) of the Revenue Act of 1924 were the rates imposed by the Revenue Act of 1921 irrespective of the reduction in those rates effected by the Revenue Act of 1924.

II. The Circuit Court of Appeals erred in holding that the 25 per cent. reduction in tax provided by Title XII of the Revenue Act of 1924 does not reduce the 1924 tax payable in 1925 of an individual partner whose 1924 income is made up in part of a share of partnership income for a fiscal year beginning in 1923.

III. The Circuit Court of Appeals erred in failing to allow the petitioners a credit of 25 per cent. of the tax on that portion of the partnership income shown on their returns for 1924 which was attributable to the year 1923.

IV. The Circuit Court of Appeals erred in holding that the returns for the calendar year 1924 wherein the petitioners included their distributive shares of the profits or income of a partnership having a fiscal year beginning in 1923 and ending in 1924 were not within the purview of Section 1201 (b) of the Revenue Act of 1924.

V. The Circuit Court of Appeals erred in each case in affirming the determination of the Board of Tax Appeals.

Summary of Argument

The 25 per cent. reduction in rates made by Congress by the Revenue Act of 1924 was operative in respect to the tax on all income earned in 1923 and attributable to that year.

The unbroken policy of the successive revenue acts has been to preserve the identity of the year to which income is attributable and to tax it at the rates applicable to such year.

The rates applicable by law to 1923 were 75 per cent. of the 1921 rates.

The act of 1924, like the previous acts, contained minute and careful provisions assuring to the fiscal year taxpayer and the partner the same reduction granted to other taxpayers.

The decision below is in flat contradiction to the correct rule as declared and applied in the First Circuit.

Argument

When a reduction of taxes was determined upon in the early months of 1924 it was the intention to grant a deduction in the taxes on 1923 income whenever paid,—the taxes, that is, imposed in respect to income earned, received or accrued during any and every part of the calendar year 1923. In other words, the tax charge on income of 1923 was to be reduced. "But," as the court below points out in its opinion (Rec., Stewart, p. 39; Shearer, p. 37), "as the bill was not ready for passage until after the returns for 1923 income had been filed, it was thought best to limit the relief to 1923 income to a credit or refund of 25 per cent." This 25 per cent. credit on a tax already reported was the only practicable way, in respect to 1923 income returned in 1924, of giving a benefit approximately equal to the reduction in rates applicable to the tax on income of subsequent years. To attempt to undo all the returns that had been filed and on which taxes had already been wholly or partially paid in March 1924 and recompute the tax would have resulted in utter chaos.

In the administration of the successive revenue acts it had long been a familiar occurrence that the fiscal year of a taxpayer, or the fiscal year of his partnership, frequently differed from the calendar year, so that the income actually received by a taxpayer in any particular calendar was made up in part of income attributable to that year and in part of income attributable to the preceding year. In such cases, not only the revenue act in force when the amendment of 1924 was undertaken, but the older acts as well, had, in pur-

suance of an unbroken policy, provided that in cases where the taxpayer's fiscal year, or his partnership's fiscal year, differed from the calendar year, the incidence of taxation should be in accord with the time the income was actually earned rather than with the time it happened to be received by the taxpayer. This principle had long been an integral part of the structure of the income tax laws. When rates of tax had been changed the change had always taken effect at the beginning of a calendar year, and when the taxpayer's fiscal year was identical with the calendar year the change was operative automatically. But when the taxpayer's fiscal year, or his partnership's fiscal year, differed from the calendar year, in such cases the law had carefully preserved the identity of the income in accordance with the year to which it had been attributable, and the applicable rates of tax had been the rates applicable to such year and not to the year in which it had happened to be received. Thus if a taxpayer had had a fiscal year ending June 30, 1922, in making his return in 1923 of income of 1922 he would show the receipt of his income for the fiscal year ending June 30, 1922, but the law separated this into its components, attributing half of it to the six months which fell within the calendar year 1921 and half to the six months ending June 30, 1922, and the tax on the 1921 half was at the 1921 rates and that on the 1922 half at the 1922 rates.

Thus in the Revenue Act of 1918 it was provided by Section 205 (a),

> "That if a taxpayer makes return for a fiscal year beginning in 1917 and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title I of the Revenue

> Act of 1916 * * * which the portion of such period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period."

Section 205 (b) of the same act of 1918 made similar provision in the case of a taxpayer making a return for a fiscal year beginning in 1918 and ending in 1919.

Both these provisions were carried with practically no change, other than the necessary new specification of years, into the Revenue Act of 1921, preserving the same section and subdivision numbers. In the act of 1924 the same provisions were continued, except that instead of being confined to the single change in rates effected by a specified statute they were made applicable in general terms to any statutory change in rates. The two paragraphs were thus merged in one, which takes the Section number 207 (a). It may be noted that this provision has continued practically unchanged in the subsequent revenue acts, as Section 207 (a) in the act of 1926 and Section 105 in that of 1928.

The unbroken policy of our revenue legislation thus carefully required and preserved the identification, for tax purposes, of income according to the year to which it was attributable and imposed the rates of tax applicable to such year. Probably these provisions might of themselves have been sufficient to provide for the segregation, for tax purposes, of a taxpayer's income that came in the form of his distributive share of earnings of a partnership having a fiscal year different from the calendar year. The succes-

sive acts, however, specifically provided for that particular kind of fiscal year income. In the act of 1918, Section 205 (c) provided that if a partnership fiscal year began in 1917 and ended in 1919, then the rates for the calendar year in which the fiscal year began should apply to that part of the income for the fiscal year which bore, to the whole of such income, the same proportion which the portion of the fiscal year falling in the first calendar year bore to the whole fiscal year; and that the rates for the calendar year in which the fiscal year ended should apply to the remainder of the income. The amount of the tax thus computed would differ slightly from the tax if computed under the general fiscal year provisions of Section 205 (a) above quoted.

This provision of the act of 1918 for the case of a partnership fiscal year was carried practically unchanged, except for the necessary change in designation of years, into the Revenue Act of 1921, retaining the same section number, and thence into the act of 1924, (the statute applicable to the cases at bar) as Section 207 (b), except that the provision was now expressed in general terms applicable to any change in rates instead of being confined to one specified statutory change, and a provision was added showing how, in such a return, the taxpayer's income other than his partnership distributive share was to be treated. As thus generalized and amplified the provision has been preserved in the subsequent act of 1926 as Section 207 (b) and in that of 1928 as Section 182 (b).

It was thus the uniform policy of the successive revenue acts, in cases where by reason of the taxpayer, or his partnership, keeping a fiscal year different from the calendar year, the income was attributable to parts of differ-

ent calendar years, to preserve the identity of the income attributable to the two calendar years portions of which made up the whole and to charge each portion with the rates for the year to which it was attributable.

Had the revenue act of 1924 been completed and become a law substantially in advance of the compilation by the taxpayers of their returns to be made by March 15 of that year, Congress would have had to do no more than reenact the provisions above quoted. But as above noted the bill was not ready for passage until the returns had been filed, the taxes computed and at least 25 per cent. thereof paid. So in respect to taxes on 1923 income included in those returns tax relief was given by a lump sum credit or refund of 25 per cent., an amount approximately, but not precisely, equivalent to the reduction in rates made effective for subsequent years. In order to harmonize the machinery of the new statute with the practice under the old in cases where the taxpayer or his partnership kept a fiscal year different from the calendar year, the 25 per cent. credit or refund was made to apply to that part of the income, whenever received or returned, which was attributable to 1923.

Manifestly his return for 1924, filed in 1925, would be the only place or occasion in respect to which a taxpayer would get his reduction in the tax on the 1923 part of any income accruing partly in 1923 and partly in 1924. It would of necessity be in the return filed in 1925 that the return of such income would appear.

As it was impracticable to require a new return and a recomputation of the tax, Congress fixed and determined the rates applicable to 1923 by a simple provision as follows:

"Sec. 1200 (a) Any taxpayer making return,

for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return. * * *"

The rates applicable to 1923 were thus fixed and determined as the rates of 1921 less 25 per cent.

This was of itself sufficient to provide for the case of a taxpayer whose income included the distributive share of the earnings of a fiscal year partnership. Section 207 (b) of the same act of 1924, which as we have seen merely reenacted in general terms a long familiar statutory provision theretofore expressed in terms of specific years, provided as follows:

"If a fiscal year of a partnership begins in one calendar year and ends in another calendar year, and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then

"(1) The rates for the calendar year during which such fiscal year begins shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year, and

"(2) The rates for the calendar year during which such fiscal year ends shall apply to an amount of each partner's share of such partnership net income (determined under the law applicable to such calendar year) equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year.

"In such cases the part of such income subject to the rates in effect for the most recent calendar year shall be added to the other income of the taxpayer subject to such rates and the resulting amount shall be placed in the lower brackets of the rate schedule applicable to such year, and the part of such income subject to the rates in effect for the next preceding calendar year shall be placed in the next higher brackets of the rate schedule applicable to such year."

In the return of each of the petitioners for 1924 (made in 1925) receipt was shown of the distributive share of the earnings of a partnership having a fiscal year ending April 30, 1924. Such fiscal year began in 1923, and in the language of the act the rates for the calendar year during which such fiscal year began were declared to apply to the portion of such income attributable to 1923 "determined under the law applicable to such calendar year," *i. e.*, to 1923. The "law applicable" to 1923 was the law which in Section 1200 (a) above quoted made the 1923 rates 25 per cent. less than those under the act of 1921. What other law was applicable to 1923? Every section in the act of 1924 that provided for a computation of the tax on income of 1923 (whether Section 1200 (a) referring to the ordinary return, Section 1201 (a) referring to a return of income attributable partly to 1922 and partly to 1923, or Section 1201 (b) referring to income attributable partly to 1923 and partly to 1924), declared that the tax should be a sum 25 per cent. less than the tax at the old 1921 rates; in other words, the law fixed and determined the 1923 rates at a sum equal to 75 per cent. of the old rates. What other law was "applicable thereto"?

So clear and definite was the legislative intent to extend to all persons paying a tax on income attributable to 1923 the benefit of the reduced rates, that even if Section 207 (b) were not so framed as to apply to the taxpayer whose income included a distributive share of partnership income attributable partly to 1923, his case would be covered by Section 1201 (a) in respect to income for a fiscal year beginning in 1922 and ending in 1923, and by Section 1201 (b) in respect to income for a fiscal year beginning in 1923 and ending in 1924. It is the latter section that would be applicable here. Section 1201 (b) provides:

> "Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period. * * *"

Manifestly this would apply to a taxpayer whose income consisted exclusively of fiscal year income. It could not be the intention of Congress to deny the benefit of the reduction to a taxpayer whose return also included ordinary income. The law made no provision for two separate returns, one of partnership or fiscal year income and one of calendar year income. The taxpayer had no alternative but to include his calendar year income in the same return with his fiscal year income. In the present case each of the returns was a fiscal year return, made on the blank provided by the department for fiscal year returns, and the peti-

tioner's calendar year income was separately stated on the same return. There was no other document in which it could have been stated. How could the petitioner be deprived of the reduction provided for by Section 1201 (b) because it so happened that his return included other income received in 1924 to which the new 1924 rates were applicable?

The amount of the tax computed under Section 1201 (b) differs slightly from its amount computed under Section 207 (b). The difference is slight, some $300 in each case. So manifest is the legislative intent to see that the reduction was made available to all taxpayers paying taxes on income attributable to 1923, whether calendar year income, fiscal year income or partnership income, that it is possible that the court might have to choose between two methods of computation. The practical difference between them is inconsequential. The government would deny relief under either, leaving the taxpayer whose income happened to be derived from a partnership having a fiscal year differing from the calendar year deprived of the benefit of the reduction under either section. This would be a plain flouting of the legislative intent.

Faced with this dilemma, the government falls back on the suggestion that such a partner gets under Section 1200 (a) a roughly compensatory reduction that on the average should approximate the reduction given to all other taxpayers. That is the section, quoted above, which provides that a taxpayer making return (in 1924) for the calendar year 1923 shall be entitled to the 25 per cent. reduction. If such a return includes a distributive share from a partnership having a fiscal year beginning in 1922 and

ending in 1923, then, it is claimed, this section is still applicable. But such a return would be made up in part of income attributable to 1922, a year for which no reduction in rates is suggested by the act. It would be a rough and ready slapstick method, giving the taxpayer in respect to 1922 income a reduction foreign to the uniformity of structure of the act, which makes no such reduction for other taxpayers, and, to balance this, denying to him any reduction whatever in respect to the 1923 portion of the next fiscal year—the year beginning in 1923 and ending in 1924. This simply balances one error against the other in the hope that the net result may be approximate exactitude! Furthermore, it disregards the fact that in many cases taxpayers may have had no 1922 income. It would be strikingly unjust to the taxpayer whose income increased from 1922 to 1924, and it would deny relief altogether to the taxpayer whose income was derived from a partnership formed in 1923. It is a crude unscientific short-cut, wholly at variance with the precise allocation of the tax according to the year to which the income was in fact attributable that distinguishes the careful and minute provisions of all the successive revenue acts in relation to fiscal years and partnership earnings.

As stated above, the Circuit Court of Appeals for the First Circuit holds the taxpayer in such cases entitled to the 25 per cent. reduction.

White v. *Maddison*, 45 Fed. (2d) 335.

The decision below in the present cases is in flat contradiction to the holding in the First Circuit.

Necessity of Authoritative Ruling

The conflict of authority now existing in the Circuit Courts of Appeals is one of serious importance. For every partnership formed in 1923 the decision of the court below in the case at bar deprives the taxpayer of any right whatever to participate in the benefit of the 25 per cent. reduction in 1923 rates granted by the Act of 1924. Such a taxpayer is left in a class by himself, penalized because his income happened to come through the channel of a partnership. The court will take judicial notice of the fact that many partnerships are formed each year, especially in the early months. Under this ruling every member of a partnership formed, for example, in March or April or May of 1923, is denied any share whatever in the reduction which Congress plainly intended to grant to every person paying a tax on income earned in 1923.

Until the present decision, the ruling in the First Circuit, recognizing the right of all taxpayers to share in a reduction of tax plainly intended for them all, stood as the authoritative guide for the department officials. The present decision sets up, in another circuit, a contrary rule. Such a conflict of authority, on a question of substantial moment, affecting thousands of taxpayers whose cases are now working their way up on the calendar of the Board of Tax Appeals, should not be allowed to continue.

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